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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT DUNN,
Defendant-Appellant,
vs.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

NO. 77-6949

SUPPLEMENTAL BRIEF

COMES NOW the appellant, Robert Dunn, pursuant to Rule 24 of the Supreme Court Rules and for his supplemental memorandum of authorities hereby states:

1. Appellant, in his Petition for Writ of Certiorari, questioned whether a statement by a witness that he had falsified approximately 90 percent of his grand jury testimony could be used against him in an inconsistent declarations prosecution under Title 18, United States Code, Section 1623(c). A further argument raised on appeal before the U. S. Tenth Circuit Court of Appeals questioned whether the trial judge erred in allowing the jury to consider declarations that were not incorporated in the indictment, to wit: the October 21, 1976, statement by appellant that he had lied to the grand jury in approximately 90 percent of his declarations. The U. S. Tenth Circuit Court of Appeals handled the variance issue as follows:

> "Furthermore, the admission into evidence of Dunn's testimony given at the Musgrave hearing does not create a fatal variance between proof at trial and the indictment. This court has consistently held that a variance between the indictment and evidence is not fatal unless the defendant could not have anticipated from the indictment what evidence would be presented at trial and unless the conviction based on an indictment would not bar a subsequent prosecution. (Citations omitted.) Clearly, where Dunn's testimony in the Musgrave motion hearing was inextricably related to his Canges statement, that is, affirming the truth of the latter, it cannot be said that Dunn could not have anticipated that such evidence would be presented against him at his perjury trial."
> (See Opinion attached to Petition for Writ of Certiorari, p. 7).

At trial, Dunn objected to the use of the testimony in the October 21, 1976, hearing before Judge Winner on the basis that the statements were not incorporated into the Indictment and therefore, could not be considered in an inconsistent declarations prosecution. Defense counsel contended that this extended the bounds of the Indictment beyond those specific statements alleged to have been inconsistent. Though not articulated very well in the Petition for Writ of Certiorari, counsel contends that the trial court and the U. S. Tenth Circuit Court of Appeals erred in overruling counsel's objections to the broadening the scope of the Indictment. Counsel for appellant contends that the trial court amended the Indictment in violation of Stirone v. United States, 361 U.S. 212 (1960). See also Russell v. United States, 369 U.S. 749 (1962).

Based on the circumstances above argued and tendered to the Court in the Petition for Writ of Certiorari, this Honorable Court is respectfully requested to review the conviction of the appellant below.

Respectfully submitted,

DANIEL J. SEARS
Federal Public Defender

CERTIFICATE OF SERVICE

I certify that copies of the above SUPPLEMENTAL BRIEF have been placed in the United States Mails on the 4th day of August, 1978, addressed as follows:

Wade H. McCree, Jr.
Office of the Solicitor General
U. S. Department of Justice
Washington, D. C. 20530

Thea Cooper

Thea Cooper